IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5847 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

AMARSINHBHAI BHILABHAI CHAUDHARY

Versus

STATE OF GUJARAT, CHIEF SECRETARY

Appearance:
Mr.Vakharia for MR TUSHAR MEHTA for Petitioner
Mr.S.N. Shelat, Additional Advocate General, with
Mr.A.D. Oza, GOVERNMENT PLEADER for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE P.B.MAJMUDAR

Date of decision: 11/09/2000

C.A.V. JUDGEMENT: (Per B.C. Patel, J.)

1. The petitioner, who was Chief Minister in the State of Gujarat, has filed this petition under Article 226 of the Constitution of India challenging the order made by His Excellency the Governor of Gujarat on 17th April, 2000 in exercise of powers under Section 8(3) of the Gujarat Lokayukta Act, 1986 (hereinafter referred to as the Act).

2. Brief Facts :

The petitioner filed Special Civil Application No.2397 of 1999, inter alia, praying for quashing and setting aside the decision / approval dated 17th January, 1997 and / or 28th January, 1997, purported to have been given under Section 19(3) of the Act as well as the letter dated 15th March, 1999. It was alleged in the petition that the respondent No.2, the present Lokayukta has a bias against the petitioner and, therefore, the proceedings pending before the Lokayukta should not be allowed to continue. Learned single Judge on 9th July, 1999 admitted the petition and granted interim relief. Against the order passed by the learned single Judge, a Letters Patent Appeal was preferred before the Division Bench, being L.P.A. No.1080 of 1999. The Division Bench was of the view that the application which was made before His Excellency the Governor cannot be treated as an application under Section 8(3) of the Act. The Division Bench considered the provisions contained in Section 19 of the Act as also Section 8(3) of the Act. Considering the submissions, the Division Bench allowed the appeal. However, it was kept open for the petitioner to move an application under Section 8(3) of the Act to His Excellency the Governor of Gujarat. After disposal of the appeal, it appears that an application was made to His Excellency the Governor. A copy of the application dated 15th October, 1999 is placed on record at Annexure `Z'. It seems that after considering the application in accordance with law and after obtaining the opinion of the Honourable the Chief Justice of the High Court of Gujarat, His Excellency the Governor, considering the opinion of the Honourable the Chief Justice, passed an order vide Annexure `A' dated 17th April, 2000 permitting the Lokayukta to proceed with the inquiry and to complete the same as directed, and to keep its report in a sealed cover, awaiting the final decision of the case pending on the judicial side of the High Court of Gujarat. Being aggrieved by the said order, the present petition is preferred.

Mr.Vakharia for the petitioner has argued that

there is sufficient material on record for coming to the conclusion that the respondent No.2 had a bias against the petitioner. He further submitted that the manner in which the respondent No.2 is conducting the proceeding, there is a reasonable apprehension in the mind of the petitioner that the respondent No.2 is keeping bias against the petitioner and that looking to the documents on record, especially when the petitioner himself has filed a petition against the respondent No.2, and respondent No.2 himself is an adversary litigant against the petitioner, His Excellency the Governor of Gujarat ought to have accepted the say of the petitioner about bias. Mr.Vakharia further argued that the petitioner was not supplied with the copy of the communication, which was forwarded to the Honourable the Chief Justice for obtaining his opinion. It is also argued that the petitioner has not been supplied a copy of the opinion forwarded by the Honourable the Chief Justice to His Excellency the Governor and that for want of the said material, it is not possible for the petitioner to know as to on what basis and on what material, the decision was taken by His Excellency the Governor and, therefore, the order of His Excellency the Governor is in violation of the principle of natural justice. He further argued that His Excellency the Governor has not given any opportunity of personal hearing to the petitioner.

3. Against the aforesaid argument, Mr.Shelat, Additional Advocate General, argued that there is no substance so far as this argument of bias is concerned. He further submitted that there was no question of giving copy of the communication which was forwarded to the Honourable the Chief Justice for his opinion. Similarly, there was no question of giving copy of the report of the Honourable the Chief Justice, which was submitted by him to His Excellency the Governor. Mr.Shelat further argued that this Court is not sitting in appeal over the decision of His Excellency the Governor and His Excellency the Governor reached the subjective satisfaction, on the material which was placed before him. Accordingly, Mr.Shelat has submitted that there is no merit in this petition. He further argued that the petition is filed to prolong the proceedings before the Lokayukta, and that there is no provision for personal hearing, and, therefore, according to him, having no substance, the petition deserves to be dismissed in limine.

4. The petitioner was a Minister of Forest at the relevant time. Spl.C.A.Nos.4343 of 1989 and 8672 of 1991 were filed, seeking an inquiry into the felling of the

trees, to which the present petitioner was one of the respondents. Large scale cutting of trees is said to have taken place in the Surat Circle of the Forest Department. The Court directed appointment of a Commission under the provisions contained in the Commission of Inquiry Act. It was also directed that it will be open for the State Government to independently consider the question of appointing Commission of Enquiry in consonance with the provisions of Section 3 of the Commission of Enquiry Act, keeping in view the provisions of Section 7 of the Act. It appears that the State Government took a decision on or about 28th May, 1996 to inquire into the allegations of large scale illegal felling of trees in the forests of Surat Circle which took place from April, 1983 to May, 1985, resulting into gross loss to the State Government to the tune of more than Rs.25/- crores and permanent damage to the environment. A retired Judge of this Court was appointed to make an inquiry by Notification dated 28th May, 1996. The Commission was to submit its report within a period of six months. However, the Commission could not submit its Report within the specified period and sought extension of the term for a period of six months, which was not granted by the Governor at the relevant time, and further decided to entrust the matter to Lokayukta and accordingly, Notification dated 20.12.1996 was issued, declaring that the said Commission shall cease to exist with effect from 30.11.1996 and in exercise of powers conferred under sub-section (3) of Section 19 of the Act, an order was passed by His Excellency the Governor, requiring the Lokayukta to investigate the matter. That is how the incident causing financial loss to the State and permanent damage to the environment was required to be examined by the Lokayukta.

5. Provisions of the Lokayukta Act :

An Act to make provision for appointment of Lokayukta for the investigation of allegations against public functionaries in the State of Gujarat and also for safeguarding the dignity and prestige of public functionaries against false and frivolous allegations and for matters connected therewith was enacted in 1986. Sub-section (2) of Section 2 defines `allegations', which reads as under :-

> "2. In this Act, unless the context otherwise requires,-

(1) ... ...

(2) "allegation" in relation to a public functionary and with reference to any action taken by him, means any affirmation that such public functionary in his capacity as a public functionary--

(a) is guilty of corruption, or lack of integrity; or

(b) was actuated in the discharge of his functions by personal interest or improper or corrupt motives; or

(c) has abused his position to obtain any gain or favour to himself or to any other person or to cause undue harm or hardship to any other person; .... "

So far as appointment of Lokayukta is concerned, Section 3, being the relevant section, is reproduced hereunder :-

"3. (1) For the purpose of conducting investigations in accordance with the provisions of this Act, the Governor shall, by warrant under his hand and seal, appoint a person to be known as the Lokayukta :

Provided that the Lokayukta shall be appointed after consultation with the Chief Justice of the High Court and except where such appointment is to be made at a time when the Legislative Assembly of the State of Gujarat has been dissolved or a Proclamation under article 356 of the Constitution is in operation in the State of Gujarat, after consultation also with the Leader of the Opposition in the Legislative Assembly, or if there be no such Leader, a person elected in this behalf by the members of the Opposition in that House in such manner as the Speaker may direct.

(2) A person shall not be qualified for appointment as a Lokayukta unless he is or has been a Judge of a High Court.

(3) Every person appointed as the Lokayukta shall, before entering upon his office, make and subscribe, before the Governor or some person appointed in that behalf by him, an oath or affirmation in the form set out for the purpose in the First Schedule."

So far as matters not subject to investigation is concerned, Section 8, being the relevant section, is reproduced hereunder :-

"8. (1) The Lokayukta shall not investigate any action,-

(a) in respect of which a formal and public inquiry has been ordered under the Public Servants (Inquiries) Act, 1850 with his prior concurrence, or

(b) in respect of a matter which has been referred for inquiry under the Commissions of Inquiry Act, 1952 on his recommendation or with his prior concurrence or by the State Government under the proviso to sub-section (2) of section 7, or

(c) in respect of a matter which has been inquired into under the enactments referred to in clauses (a) and (b) or has been finally decided by a competent court.

(2) The Lokayukta shall not investigate any complaint which is excluded from his jurisdiction by virtue of a notification issued under Section 20.

(3) The Lokayukta shall not inquire into any matter concerning any person if he has any bias in respect of such matter or person and if any dispute arises in this behalf, the Governor shall, on an application made by the party aggrieved, obtain in such manner as may be prescribed, the opinion of the Chief Justice of the High Court and decide the dispute in conformity with such opinion.

(4) The Lokayukta shall not inquire into any complaint if the complaint is made after the expiry of five years from the date on which the action mentioned in such

complaint is alleged to have been taken."

Section 19 refers to conferment of additional function in relation to eradication of corruption. The said section reads as under :

> "19. (1) The Governor may, by notification published in the Official Gazette and after consultation with the Lokayukta confer on the Lokayukta such additional functions in relation to the eradication of corruption as may be specified in the notification.
>
> (2) The Governor may, by order in writing and after consultation with the Lokayukta confer on the Lokayukta such powers of a supervisory nature over agencies, authorities or officers set up, constituted or appointed by the State Government for the eradication of corruption as may be specified in the order.
>
> (3) The Governor may, by order in writing and subject to such conditions and limitations as may be specified in the order, require the Lokayukta to investigate any action (being action in respect of which a complaint may be made under this Act to the Lokayukta) and notwithstanding anything contained in this Act, the Lokayukta shall comply with such order.
>
> (4) When any additional functions are conferred on the Lokayukta under sub-section (1) or when the Lokayukta is to investigate any action under sub-section (3), the Lokayukta shall exercise the same powers and discharge the same functions as he would in the case of any investigation made on a complaint involving an allegation, and the provisions of this Act shall apply accordingly."

So far as appointment of Lokayukta is concerned, the petitioner has a grievance that he being the Leader of the Opposition in the Legislative Assembly, there was no effective consultation with him and without consulting him the appointment was made. Section 3 contemplates that for the purpose of conducting investigation in accordance with the provisions of the Act, the Governor

shall by warrant under his hand and seal, appoint a person to be known as `Lokayukta". It requires that Lokayukta shall be appointed after consultation with the Chief Justice of the High Court of Gujarat. At the time when such appointment is to be made, if the Legislative Assembly of the State of Gujarat has not been dissolved or there was no proclamation under Article 356 of the Constitution in operation in the State, then there should be consultation with the Leader of the Opposition in the Legislative Assembly. If there is no such leader in opposition, then, in that case, the person elected in this behalf by the members of the opposition in that house in such manner as the Speaker may direct, may be consulted. The petitioner challenged the appointment of Lokayukta in earlier proceedings as there was no consultation as understood by him. In those proceedings, the State of Gujarat is respondent No.1 and the Lokayukta is also one of the respondents. It was urged before the Court that in exercise of the powers conferred under sub-section (3) of Section 9 of the Act, an order was passed by His Excellency the Governor requiring the Lokayukta to investigate the matter. Sub-section (3) indicates that when an order is made by the Governor in writing subject to such conditions and limitations, if any, as specified in the manner, calling upon the Lokayukta to investigate any action, then notwithstanding anything contained in the Act, the Lokayukta has to comply with the said order.

It was submitted before us that as stated earlier, it appears that in earlier petition filed by the petitioner, an interim order was passed which was challenged before the L.P.A. Court, being L.P.A.No.1080 of 1999.

Section 8 of the Act was considered by the Court. The petitioner wanted to say that Lokayukta should not inquire into the matter as he had a bias. The Court pointed out that on interpretation of sub-section (3) of Section 8, one has to apply in consonance with the provisions. The provisions are self-contained and provide for the procedure for approaching His Excellency the Governor if there is any dispute under sub-section (3) of Section 8 of the Act and, thereafter, the dispute is to be decided in accordance with the provisions contained in sub-section (3) of Section 8 of the Act.

6. Mr.Vakharia, learned counsel, submitted that in the instant case, by a notice at Annexure `D' on 5.2.1999, the petitioner was informed about the investigation against the public functionary, calling

upon him to show cause on or before 19th February, 1999 as to why investigation should not be conducted in public.

7. Under Section 17(1) of the Rules a notice dated 5.2.1999 (vide Annexure `E') was served on the petitioner in this behalf and he was required to file statement in reply and to offer comments and explanation supported by an affidavit along with the true copies of the documents under his signature on or about 19.2.1999, intimating further that on failure the matter shall proceed in his absence. A statement, setting out the grounds, 11 in number, was also forwarded to the petitioner and he was required to explain and to make comments on the grounds.

8. On 19.2.1999, an application on behalf of the petitioner addressed to the Registrar, Office of the Lokayukta, was tendered, inter alia, stating that the petitioner never received the copy of the decision or an order under Section 19(3) of the Act and requested to supply a copy of the order and decision of His Excellency the Governor of Gujarat on payment of charges. For further communication, the petitioner did not furnish his address but furnished the address of his Advocate. (This was written by the learned Advocate, and possibly must have been under the instructions of the petitioner). On 19.2.1999, the petitioner submit....

time on the ground that he is busy with the election campaign. It appears that by order dated 22.2.1999, the Registrar, under the direction of the Lokayukta informed that in view of Rule 23 of the Rules, the application dated 19.2.1999 cannot be taken note of, and hence, was filed.

9. Rule 23 of the Gujarat Lokayukta Rules, 1989, being relevant, is reproduced hereinbelow :-

> "23. Appearance of Advocate, Pleader, etc: Ordinarily, no Advocate, Pleader, Muktyar or other legal representative shall be allowed to appear before the Lokayukta in the investigations under this Act :
>
> Provided that the Lokayukta may in specific cases allow the parties to appear through any such person if the Lokayukta is satisfied that such appearance is necessary in the interest of the proper disposal of the complaint."

It is clear from the provisions aforesaid that there must be something on the record to satisfy the Lokayukta that the appearance of an Advocate is necessary in the interest of the proper disposal of the complaint. In the absence of any material placed before the Lokayukta, how the Lokayukta would arrive at a satisfaction as contemplated in the Rule. When the Legislature has thought it fit that for participating in the proceedings, there must be some material pointing out that assistance of a lawyer is necessary for the purpose of proper disposal of the complaint. For that purpose, Lokayukta will have to consider the same and record his satisfaction. Ordinarily, Advocate is permitted to appear on behalf of the defendant, but when the Legislature has thought if fit not to permit a lawyer to take part, ordinarily, in the absence of reply, indicating the need as contemplated in the rule to reach a proper satisfaction, to expect the Lokayukta to grant an application mechanically would amount to asking the Lokayukta to prejudge the matter that the matter is a complicated one and without the assistance of a lawyer, matter cannot be decided. It appears that the petitioner was not allowed to engage an advocate by order dated 5th March, 1999 at Annexure `Y' to the petition.

10. By an order dated 22nd February, 1999, Annexure `J', order was passed that Lokayukta shall proceed ex parte under Rule 20 of the Rules. Rule 20 of the Rules reads as under :-

> "20. Failure to reply:- If such public functionary fails to appear personally to file his reply and to offer his comments or fails to file his reply and to offer his comments, within the time specified or granted under sub-rule (1) of rule 17, the complaint may be heard and decided in his absence."

It appears that vide Annexure `K' dated 25.2.1999 in response to notice dated 5.2.1999, calling upon the petitioner as to why an investigation should not be conducted in public, the petitioner gave a reply, inter alia, pointing out that he was busy in election campaign and he has requested for time. He pleaded that time given was too short to collect all information necessary and prayed for time of four weeks. On 25.2.1999, the petitioner submitted another application under Rule 17(1). It was an application to condone the delay and to extend the time to file reply and to offer comments, vide Annexure `M'. Vide Annexure `N', the petitioner

forwarded another application dated 25.2.1999 praying for copy of the order passed by His Excellency the Governor, decision and order under sub-section (3) of Section 19 of the Act and other documents. On 25.2.1999, vide Annexure `O', an application was submitted to permit him to engage an advocate and a senior counsel. All these papers were forwarded through the Private Secretary to the petitioner.

11. So far as contention of delay, extension of time to file reply and offering comments are concerned, considering Rule 21 of the Rules, which was reproduced in the order communicated to the petitioner, application was filed. His other application for time to file reply was also filed. So far as supply of copies is concerned, attention of the petitioner was drawn to Rule 41 of the Rules. The aid Rule 41 reads as under :-

> "41. Certified copy:- No person shall be entitled to a certified copy of any record of the proceeding before the Lokayukta :
>
> Provided that, subject to the Provisions of sub section (2) of section 10 and sub section (1) of section 16, the Lokayukta may permit a certified copy to be granted of the final order passed in a case, or of such part thereof, as he may deem fit."

On 26th February, 1999, the petitioner was informed that his application for engaging an advocate is fixed for hearing on 5.3.1999. On 5.3.1999, the request for permission to engage an advocate or senior counsel was rejected by the Lokayukta. The petitioner was further informed that he was required to remain present personally in the office of the Lokayukta, failing which the matter will be heard and decided in his absence.

It appears that after the order passed by the Lokayukta, the petitioner challenged the order before this Court by filing Special Civil Application No.3130 of 1990. Ultimately, by an order dated 22.6.1999, the petitioner was permitted to engage an Advocate and Senior Counsel of his choice. The aforesaid order was passed by a further order below Exhibit 56.

12. Both the sides have argued the matter at great length and has cited various judgments on the point in question. So far as the question about justiciability of the order of His Excellency the Governor is concerned,

Mr.Vakharia has relied upon the judgment of the Apex Court in the case of S.R. Bommai and others v. Union of India and others, AIR 1994 SC 1918. So far as the aforesaid case before the Honourable Supreme Court is concerned, it was in connection with the proclamation issued by the President of India under Article 356 of the Constitution of India. Whether such proclamation can be subject to judicial review or not has been considered in paragraph 54 by the Apex Court. A reference to the aforesaid paragraph 54 is required to be made :-

> "... 54. Before we examine the scope and the limitations of the judicial review of the Proclamation issued under Art. 356(1), it is necessary to deal with the contention raised by Shri Parasaran appearing for the Union of India. He contended that there is difference in the nature and scope of the power of judicial review in the administrative law and the constitutional law. While in the field of administrative law, the Court's power extends to legal control of public authorities in exercise of their statutory power and therefore not only to preventing excess and abuse of power but also to irregular exercise of power, the scope of judicial review in the constitutional law extends only to preventing actions which are unconstitutional or ultra vires the Constitution. The areas where the judicial power, therefore, can operate are limited and pertain to the domain where the actions of the Executive or the legislation enacted infringe the scheme of the division of power between the Executive, the Legislature and the Judiciary or the distribution of powers between the States and the Centre. Where, there is a Bill of Rights as under our Constitution, the areas also cover the infringements of the fundamental rights. The judicial power has no scope in constitutional law beyond examining the said infringements. He also contended that likewise, the doctrine of proportionality or unreasonableness has no play in constitutional law and the executive action and legislation cannot be examined and interfered with on the anvil of the said doctrine. We are afraid that this contention is too broad to be

> accepted. The implication of this contention, among others, is that even if the Constitution provides pre-conditions for exercise of power by the constitutional authorities, the Courts cannot examine whether the preconditions have been satisfied. Secondly, if the powers are entrusted to a constitutional authority for achieving a particular purpose and if the concerned authority under the guise of attaining the said purpose, uses the powers to attain an impermissible object, such use of power cannot be questioned. We have not been pointed out any authority in support of these propositions. We also find that many of the parameters of judicial review developed in the field of administrative law are not antithetical to the field of constitutional law, and they can equally apply to the domain covered by the constitutional law. That is also true of the doctrine of proportionality ...."

13. Mr.Shelat, learned Additional Advocate General, submitted that, no doubt, the impugned order of His Excellency the Governor of Gujarat can be subject to judicial review in view of the decision of the Apex Court in S.R. Bommai's case (supra). However, he argued that even while examining the aforesaid order, powers of this Court are very limited and this Court cannot sit in appeal over the aforesaid decision. In his submission, therefore, even though the order is justiciable under Article 226 of the Constitution of India, the scope of this Court while exercising the powers under Article 226 will be very limited especially when the order of His Excellency the Governor is based on the opinion of the Honourable the Chief Justice and when two constitutional authorities have reached the conclusion that there is no element of bias, this Court exercising extraordinary jurisdiction under Article 226 should not interfere with the said order. In view of the aforesaid arguments of both the counsel and in view of the judgment of the Honourable Apex Court in Bommai's case, we uphold the contention of Mr.Vakharia to the effect that the order in question is justiciable and petition under Article 226 of the Constitution is maintainable.

14. The main contention in the petition for challenging the impugned order of His Excellency the Governor is that there is sufficient material on the

record for coming to the conclusion that the Lokayukta has bias against the petitioner and that in view of the facts, circumstances and material on the record, should have decided the dispute as raised by the petitioner under Section 8(3) of the Gujarat Lokayukta Act, 1986 in favour of the petitioner and His Excellency the Governor ought to have held that there was bias by the Lokayukta against the petitioner. As stated in the earlier part of this judgment, Mr.Vakharia has relied upon certain orders, which Lokayukta has passed during the course of proceedings, such as not giving sufficient adjournment, not allowing to engage Advocate, for conducting investigation of the aforesaid case in public, and such other incidental orders, though, as stated earlier, subsequently, permission for engaging an Advocate and Senior Counsel was already granted by the Lokayukta.

15. Mr.Vakharia for the petitioner has relied upon various judgments to substantiate his say about bias. He has relied upon the decision in Manak Lal v. Dr.Prem Chand Singhvi and others, AIR 1957 SC 425. In the aforesaid decision, the Honorable Supreme Court was dealing with a case regarding attribution of bias against Chairman of Bar Council Tribunal. The relevant observation on the aforesaid point of bias is in paragraph 4. In the aforesaid paragraph 4 of the aforesaid judgment, it has been stated as under :-

> "... It is well settled that every member of a tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decisions and judicial administration that judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the Tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done.

16. Mr.Vakharia has also relied upon the judgment of the Honourable Supreme Court in A.K. Kraipak and others v. Union of India and others, AIR 1970 SC 150. In the

aforesaid case, some of the Gazetted Officers serving in the forest department of the State of Jammu and Kashmir had challenged selections made from amongst the officers serving in the Forest Department in the State of Jammu and Kashmir to the Indian Forest Service. The selection was challenged by them on various grounds. Considering the question of bias, the Apex Court has observed as under in paragraph 15 of the judgment :-

> "... 15. It is unfortunate that Naqishbund was appointed as one of the members of the selection board. It is true that ordinarily the Chief Conservator of Forests in a State should be considered as the most appropriate person to be in the selection board. He must be expected to know his officers thoroughly, their weaknesses as well as their strength. His opinion as regards their suitability for selection to the All India Service is entitled to great weight. But then under the circumstances, it was improper to have included Naqishbund as a member of the selection board. He was one of the persons to be considered for selection. It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the selection board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney-General that a mere suspicion of bias is not

> sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias, we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list or selected candidates .... "

17. Mr.Vakharia further relied on the judgment in S. Parthasarathi v. State of Andhra Pradesh, AIR 1973 SC 2701. The Honourable Apex Court has observed as under :-

> "... The continuance of inquiry by biased officer, ceasing to officiate as officer appointed to inquire was bad in law. The subsequent authorization by Govt. by name did not validate the inquiry proceedings and the order of Punishment passed on the basis of such inquiry was illegal, invalid and inoperative .... "

18. Mr.Vakharia has further relied upon the judgment of the Apex Court in Ashok Kumar Yadav and others v. State of Haryana and others, AIR 1987 SC 454. The Apex Court, in paragraph 16 of the judgment, has observed as under :-

> "... It is one of the fundamental principles of our jurisprudence that no man can be a judge in his own cause and that if there is a reasonable likelihood of bias it is "in accordance with natural justice and common sense that the justice likely to be so biased should be incapacitated from sitting". The question is not whether the judge is actually biased or in fact decides partially, but whether there is a real likelihood of bias. What is objectionable in such a case is not that the decision is actually tainted with bias but that the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision. The basic

> principle underlying this rule is that justice must not only be done but must also appear to be done .... "

19. Mr.Vakharia has relied upon the decision of the Supreme Court in Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others, AIR 1993 SC 2155. In paragraph 11, the Apex Court has observed :-

> "... If a person has a pecuniary interest, such interest, even if very small, disqualifies such person. For appreciating a case of personal bias or bias to the subject matter, the test is whether there was a real likelihood of a bias even though such bias has not in fact taken place .... "

20. Relying upon the aforesaid judgments, it was argued by Mr.Vakharia that when the petitioner has challenged the appointment of Lokayukta by way of filing substantive Special Civil Application, the said Lokayukta should not hold enquiry against him as there will be a presumption of bias in view of the Special Civil Application filed by the petitioner against him. On that basis, therefore, Mr.Vakharia has challenged the impugned order at Annexure `A'.

21. According to the petitioner the way in which the proceedings were ultimately conducted by the Lokayukta strengthens the apprehension of the petitioner that he will not be able to get fair opportunity to meet with his case. Mr.Vakharia has also submitted that the impugned order at Annexure `A' is casual in nature and that without looking to the material on record, the order is passed and no detailed reasons are given in the order and no personal hearing is afforded to him before passing the order at Annexure `A'.

22. Against the aforesaid argument, Mr.Shelat, learned Additional Advocate General for the State, submitted that there is no substance in the argument of Mr.Vakharia regarding bias. He submitted that when the petitioner filed his earlier petition, challenging the appointment of Lokayukta, no enquiry at that time was initiated against the petitioner by the Lokayukta. He further submitted that when the aforesaid Special Civil Application has been filed by the petitioner, wherein he has challenged the appointment of Lokayukta, the said

appointment is challenged only on legal points, i.e. non-consultation of the petitioner, who was the Leader of the Opposition as contemplated under Section 3(1) of the Act. Mr.Shelat, therefore, submitted that simply because a petition on some question of law has been filed, wherein appointment of Lokayukta has been challenged, there cannot be any presumption that the respondent No.2 herein has got bias against the petitioner. It is pertinent to note that in the earlier petition, wherein the appointment of Lokayukta was challenged, no allegation against Lokayukta has been made in any manner. Mr.Shelat has further argued that during the course of proceedings before the Lokayukta if any interim orders are passed against the party, no bias can be attributed as these are orders during the course of proceedings and simply because some interim order is passed against the petitioner, that itself can never form basis for arriving at the conclusion that there is a bias. He further submitted that before November, 1998, i.e. before Lokayukta, respondent No.2, took charge, proceedings were initiated against the petitioner and Commission was also appointed, though, subsequently, the time of the Commission was not extended. Before 25th November, 1998, the Government had already taken decision to refer the matter to Lokayukta. According to Mr.Shelat, therefore, it is not the case where after the appointment of the present Lokayukta, the enquiry was handed over to the Lokayukta against the present petitioner. He also further submitted that there are no allegations in the petition against the Lokayukta about personal animosity.

23. To substantiate his say that there is no bias, Mr.Shelat has relied upon various judgments. Mr.Shelat has relied upon the judgment of the Apex Court in the case of Tata Cellular v. Union of India, AIR 1996 SC 11. In the aforesaid case, the Honourable Supreme Court has considered the question of bias in paragraphs 132 and 156 of the said judgment. The Supreme Court has said that :-

> "... The rules of bias is founded on the well-known maxim nemo judex non causa suat no person can be a judge in his own cause. Where a Govt. officer in discharge of his statutory duties recommended acceptance of tender submitted by a company in which his son was employed and that Govt. officer was not a decision-maker at all but was one of the recommending authorities, no bias could be alleged against him merely because his son was an employee in that company .... "

On the scope of judicial review, in paragraph 113, the Apex Court has stated as under :-

> "... The principles deducible relating to scope of judicial review of administrative decisions and exercise of contractual powers by government bodies are :-
>
> (1) The modern trend points to judicial restraint in administrative action.
>
> (2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
>
> (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible.
>
> (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
>
> (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts but must be free from arbitrariness not affected by bias or actuated by mala fides.
>
> (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure ...."

24. Mr.Shelat has also relied upon the judgment of the Punjab and Haryana High Court in case of Kapur Singh v. Union of India, AIR 1956 Punjab 58. In the aforesaid judgment, it has been held by the Punjab High Court that :-

> "... An effective showing of bias and prejudice cannot be made out on the basis of unfavourable rulings only ... Where an inquiry against a public servant, the commissioner rejects several requests of the public servant which he considered to be unreasonable giving satisfactory reasons in support of his decisions, no charge of bias or prejudice can be made against the Commissioner .... "

25. Relying upon the aforesaid judgments, it was argued by Mr.Shelat that there is no element of bias at all and when during the course of proceedings if some interim orders are passed, decision on such orders can never constitute bias.

26. Considering the aforesaid arguments of both the sides and considering the case law on the subject, we are of the opinion that there is no basis for coming to the conclusion that the respondent No.2 was keeping any bias against the present petitioner. The apprehension on the part of the petitioner about bias is not at all reasonable. Simply because the petitioner has challenged the appointment of Lokayukta, that fact itself cannot constitute any bias and it is not possible for coming to the conclusion that simply because such petition is filed, there is an element of bias in the mind of respondent No.2. As observed earlier, the respondent No.2 had not started enquiry against the petitioner at the time when his appointment was challenged by way of Special Civil Application. The Special Civil Application has been filed purely on the question of law, i.e. on the ground of consultation, and no allegations of personal nature or of any other type, have been made in the said Special Civil Application against the respondent No.2. We are, therefore, of the opinion that simply because on some questions of law, the petitioner has filed Special Civil Application by challenging the appointment of Lokayukta, that fact itself cannot constitute any bias and it is, therefore, not possible to believe that simply because a petition has been filed, there is a reasonable apprehension in the mind of the petitioner that the respondent No.2 will act with bias.

It is not possible to believe that simply because the petitioner has challenged the appointment of Lokayukta, there is a reasonable suspicion in the mind of the petitioner that the Lokayukta will not act in accordance with law. It cannot be said that the petitioner is having any personal grudge, animosity or any professional rivalry with the respondent No.2. In that view of the matter, we do not find any substance in the argument of Mr.Vakharia that simply because the petition has been filed by him challenging the appointment of respondent No.2, there is a likelihood of bias by the respondent No.2 against the petitioner. We, therefore, negative the said argument.

27. Similarly, simply because during the course of proceedings, some interim orders are passed and even if some interim ruling is not in favour of the petitioner, we cannot jump to the conclusion that the respondent No.2 was having bias against the petitioner. Simply because an adjournment may not have been given or investigation is ordered to be held in public, and simply because at the initial stage, Advocate was not permitted , it cannot be said that the aforesaid orders were passed due to bias attitude of respondent No.2. In fact, all those orders were in consonance with the provisions of law and rules. We, therefore, do not find any substance in the argument of Mr.Vakharia so far as the question of bias is concerned.

28. The Act makes a provision for appointment of Lokayukta for investigation of allegations against public functionaries in the State of Gujarat and also for safeguarding the dignity and prestige of public functionaries against false and frivolous allegations and for matters connected therewith. When allegations are made against a public functionary which calls for action against such public functionary in his capacity as a public functionary, in case of allegations of corruption or lack of integrity or public functionary being actuated in the discharge of his functions by personal interest or improper or corrupt motives, or has abused his position to obtain any gain or favour to himself or to any other person or to cause undue harm or hardship to any other person, then such allegations are to be investigated. If there is any allegation under the Central Act, Viz., the Prevention of Corruption Act, action can be initiated against such persons. Looking to the nature of the allegations, the investigating agency can investigate the crime in question. Merely because one person has become a public functionary, he is not above the law. However, the Legislature thought it fit that that in certain

cases, the matter must be enquired by a person appointed as Lokayukta, who is or who has been a Judge of a High Court. Thus, investigation is to be carried out by an independent person about the allegations made against a public functionary.

Section 10 of the Act contemplates the procedure in respect of investigation. The Public Functionary concerned is required to be given an opportunity to offer his comments on such complaint or statement made. Section 11 of the Act refers to evidence. Section 11(1) provides that the Lokayukta may require any public servant or any other person who, in his opinion, is able to furnish information or produce documents relevant to the investigation, to furnish any such information or produce any such documents. Section 11(2) provides that for the purpose of any such investigation (including the preliminary inquiry), the Lokayukta shall have all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 in respect of matters enumerated therein. After recording the evidence, the Lokayukta has to make a report as contemplated in Section 12 or Section 13 of the Act, as the case may be. If the investigation has been made against the Chief Minister or against the Chief Minister in conjunction with any other public functionary, and if the Lokayukta is satisfied that such allegation can be substantiated either wholly or partly against the Chief Minister, he shall, by a Report, in writing, communicate his findings along with the relevant documents, materials and other evidence to the Chief Minister. Section 12(2) provides that on receipt of such report, the Chief Minister shall cause the same to be placed, without delay, before the Council of Ministers. With regard to other public functionaries, report is to be made to the competent authority. The competent authority has to examine such report and has to inform the Lokayukta within three moths of the date of the receipt of the report the action taken or proposed to be taken on the basis of the report.

The Legislature has thought it fit to entrust the responsibility of investigating allegations against the public functionary by a person appointed as Lokayukta, who is or has been a Judge of a High Court. In prescribing the qualification of Lokayukta as a person who is or has been a Judge of a High Court, the quality and competence of a High Court Judge deserves to be taken note of. Recently, in a judgment in Special Civil Application No.3426 of 1998 and others pronounced on 5th September, 2000, speaking for a Division Bench of this Court, to which one of us was a party (B.C. Patel, J.),

the Honourable the Chief Justice D.M. Dharmadhikari made the following pertinent observation in paragraph 22 of the judgment :-

> "... a Judge on assuming office during his tenure is cut off from the society as he cannot continue to be in public life, but as he also comes from the society with his own experience of it, he is better stationed at a distance from the problems of the society to view them in a more objective, detached and dispassionate manner, than those involved in it, and for that reason, he is more suited to resolve conflicts and competing claims of the individual and the society .... "

29. Lokayukta being a person who is or has been a Judge of a High Court, and being "stationed at a distance from the problems of the society to view them in a more objective, detached and dispassionate manner", the allegations in the petition of his being influenced or biased on account of filing of a petition against his appointment, is too petty to be made against a person holding the high office of Lokayukta and such contentions deserve to be condemned. It is not the case of the petitioner that the Lokayukta is deciding his own cause in the present investigation, as has been the case in the judgments cited by Mr.Vakharia.

In ordinary cases, investigation is carried out by a Police Officer. His powers are also wide. In spite of that, ultimately cognizance is required to be taken by the Court in case offence alleged to have been committed by a person is prima facie established.

In the instant case, Lokayukta is not trying any suit or criminal proceedings, but Lokayukta is investigating the allegations, and report is to be submitted only if the Lokayukta is satisfied that such allegation can be substantiated. The purpose of appointment of Lokayukta is not only "for investigation of allegation against public functionaries" but also "for safeguarding the dignity and prestige of public functionaries against false and frivolous allegations". Therefore, at this stage, it is too premature to presume that with a biased mind, the Lokayukta will come to a conclusion that the allegation can be substantiated. On the other hand, he may even safeguard the dignity and prestige of public functionary by concluding that the

allegations are false and frivolous. Ultimately, it is not for the Lokayukta to take any action but it is for the Council of Ministers or the competent authority to consider the report and take appropriate action. The Apex Court in Tata Cellular v. Union of India (supra) pointed out that in the case of an Officer acting as recommending authority and not a decision making authority in case of recommending a tender of the company, where his son was working, bias cannot be alleged. In the present case, the Lokayukta, under the statute, is not an authority to initiate the action, but has to make a report only.

30. Now, so far as the question about natural justice is concerned, Mr.Vakharia has relied upon the decisions in Busudeo Tiwary v. Sido Kanhu University and others, (1998) 8 SCC 194, and State Bank of Patiala and others v. S.K. Sharma, AIR 1996 SC 1669. In AIR 1996 SC 1669 (supra), the Supreme Court on the question of natural justice evolved certain basic principles, keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee. It has been observed in paragraph 32 of the said judgment :-

> "... While applying the rule of audi alteram partem (the primary principle of natural justice), the Court / Tribunal / Authority must always bear in mind the ultimate and overriding objective underlying the said rules, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them ... There may be situations where the interest of State or pubic interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to balance public / State interest with the requirement of natural justice and arrive at an appropriate decision .... "

31. In (1998) 8 SCC 194 (supra), the Apex Court, dealing with the case of termination of service, reiterated that non-arbitrariness, natural justice and audi alteram partem, are facets of concept of equality, and in paragraph 9, held as under :-

> "... Non-arbitrariness is an essential

> facet of Article 14 pervading the entire realm of State action governed by Article 14. Natural justice in turn is an antithesis of arbitrariness. It therefore, follows that audi alteram partem which is facet of natural justice is a requirement of Article 14. In the sphere of public employment, it is well settled that any action taken by the employer against an employee must be fair, just and reasonable which are the components of fair treatment. The conferment of absolute power to terminate the services of an employee is an antithesis of fair, just and reasonable treatment .... "

32. Against the aforesaid argument, regarding natural justice, Mr.Shelat argued that His Excellency the Governor has considered the report of the Honorable the Chief Justice and ultimately the decision is based on such report.

33. Mr.Shelat has argued that the scheme of Section 8 of the Act does not contemplate personal hearing. The provisions of the Act and Rules have been complied with while rendering the decision by His Excellency the Governor. According to him, no personal hearing before the Governor is contemplated or required under the provisions of the Act. He further argued that the report of the Honourable the Chief Justice was submitted to His Excellency the Governor and on the basis of such report, the Governor has reached the subjective satisfaction that there is no bias. The report of the Honourable the Chief Justice is possessed by the Governor for coming to his own subjective satisfaction and that there is no question of giving copy of such report to the petitioner. Mr.Shelat to substantiate his say that no hearing is required, has relied upon the judgment of the Apex Court in case of Union of India v. Jyoti Prakash Mitter, AIR 1971 SC 1093 in connection with the proceedings under Article 217(3) of the Constitution of India. The Apex Court has observed as under in paragraphs 24 and 25 :-

> "... Article 217(3) does not guarantee a right of personal hearing. Nor is a personal hearing a necessary incident of rules of natural justice. Except in proceedings in Courts, a mere denial of opportunity of making an oral representation will not, without more,

> vitiate the proceedings. A party likely to be affected by a decision is entitled to know the evidence against him and to have an opportunity of making a representation. He however cannot claim that an order made without affording him an opportunity of a personal hearing is invalid. The President while making an enquiry is not a Court and the giving of personal hearing is entirely discretionary .... "

34. Mr.Shelat has also relied upon the judgment in the case of State of U.P. & Anr. v. Nand Kumar Agarwal, JT 2000 (7) SC 302. It has been observed by the Apex Court as under :-

> "... So far as the question of giving personal hearing is concerned, on the express language of Section 48 it must be held that personal hearing is not contemplated in the said provision, though of course, if the authorities think it fit, they may give the opportunity of personal hearing while holding appropriate enquiry. In the present case, however, the impugned order cannot be voided on the ground that personal hearing was not given .... "

35. Mr.Shelat, therefore, submitted that in view of the aforesaid, there is no question of giving any personal hearing by the Governor to the petitioner.

36. Considering the arguments of both sides, we are of the opinion that the Governor, after consideration of the report of the Honourable the Chief Justice, has ultimately reached the conclusion that there is no bias. It is not a full-fledged proceedings before the Governor and on the material available before the Governor in the form of the report of the Chief Justice, the Governor has come to the conclusion that there is no substance in the allegation about bias, and we do not read any provision for giving hearing in such type of proceedings before the Governor. Ultimately, it is a matter of subjective satisfaction of the Governor and it cannot be said that the said decision is based on irrelevant consideration. No such personal hearing is contemplated under the Act. Even if principles of natural justice is stretched to its full extent, then also it is not possible to come to the conclusion that the order in question is bad as no

personal hearing is given to the petitioner before arriving at the said decision. We do not find any substance in the argument about violation of natural justice on the aforesaid point and we accordingly reject the said submission of Mr.Vakharia.

37. It is to be kept in mind that before passing the order dated 17th April, 2000, His Excellency the Governor has sought the opinion of the constitutional functionary, i.e. the Honourable the Chief Justice of Gujarat, and the Honourable the Chief Justice has given his opinion on consideration of the application of the public functionary dated 15.10.1999, together with all the documents, the observations of the Lokayukta, the subject matter in the writ petition on the judicial side and interim orders passed on the same. On the basis of the opinion rendered by the Honourable the Chief Justice, His Excellency the Governor has passed the impugned order. There is meeting of mind of at least two Constitutional Functionaries, the Honourable the Chief Justice and His Excellency the Governor. Therefore, even though the aforesaid order can be subjected to judicial review, it can never be said that the aforesaid order suffers from non-application of mind or is contrary to the principles of natural justice or that it suffers from not considering the material documents on record. Whether a functionary holds bias or not would be a question of fact and when His Excellency the Governor has taken the decision after considering various aspects and also after considering the report of the Chief Justice, it cannot be said that the aforeaid decision suffers from any infirmity. We are not exercising our appellate power against the aforeaid decision. It cannot be said that the impugned order is in any way patently irrational or illegal and we cannot interfere with the said order and find out whether the subjective satisfaction reached by His Excellency the Governor was proper or not.

38. In the instant case, we find that in the case of the person against whom earlier the Court expressed an opinion that the matter is required to be investigated. Ultimately under the Commission of Enquiries Act, a retired Judge of the High Court was appointed to conduct the inquiry. However, the time being over, the matter was referred to the Lokayukta before the respondent NO.2 took over as Lokayukta. The petitioner, being highly interested in seeing that the proceedings are not conducted, challenged the proceedings on the ground that he was not consulted. The petitioner has subsequently filed a petition on the ground that there is bias on the basis of filing of petition by him, wherein no

allegations have been made against the Lokayukta. In our opinion, the petitioner is of the view that investigation should be conducted by a person of his choice. That cannot be done. If such a mode is permitted, then investigations conducted by Police Officers will be also challenged and the accused will try to see that the offence is not investigated. Ultimately the Court has to appreciate the evidence and the material placed before it and come to the conclusion that investigation was biased, but at the stage of investigation, on such ground, investigations cannot, and should not, be delayed.

39. We, therefore, do not find any justification in any of the arguments of the petitioner in this behalf. Since we do not find any substance in this petition, the petition deserves to be dismissed at the admission stage. Petition is dismissed summarily, however, with no order as to costs.

September 11, 2000 (B.C. Patel, J.)

(P.B. Majmudar, J.)

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(apj)